

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,
Department of Insurance, Securities
and Banking,

Petitioner,

v.

D.C. CHARTERED HEALTH PLAN,
INC.,

Respondent.

Civil Action No.: 2012 CA 008227 2

Judge: Melvin R. Wright

Calendar: 15

Next Event: Status Hearing

May 30, 2013, at 9:30 a.m.

THE REHABILITATOR'S OPPOSITION TO D.C. HEALTHCARE SYSTEM, INC.'S
MOTION TO COMPEL REHABILITATOR TO PURSUE CHARTERED CLAIM
AGAINST THE DISTRICT OF COLUMBIA

The District of Columbia and William P. White, Commissioner of the District of Columbia Department of Insurance, Securities and Banking ("Rehabilitator"), by and through their attorneys, the Office of the Attorney General of the District of Columbia, with Daniel L. Watkins, as Special Deputy to the Rehabilitator for D.C. Chartered Health Plan, Inc. ("Chartered"), oppose D.C. Healthcare Systems, Inc.'s ("DCHSI") Motion to Compel Rehabilitator to Pursue Chartered Claim Against the District of Columbia and Request for an Expedited Status Conference on or before April 16, 2013 ("Motion to Compel"). The Court should deny the Motion to Compel because (1) DCHSI has not demonstrated any of the legal or factual requirements necessary to obtain the emergency or preliminary injunctive relief it seeks and (2) DCHSI cannot be permitted to interfere with or second-guess the litigation strategy of the Rehabilitator in exercising his duty to pursue all of Chartered's claims against the District. This Court already has denied DCHSI's recent attempt to use injunctive relief to substitute the

Rehabilitator's judgment with its own in its April 2, 2013 Order. Therefore, this application for a similar remedy is equally meritless and should be denied.

**DCHSI's Motion to Compel Injunctive Relief Lacks Merit,
Is Insupportable, and Must be Denied**

DCHSI's Motion to Compel is a thinly-veiled attempt to obtain injunctive relief without meeting any of the elements required to obtain such an extraordinary remedy. DCHSI asks this Court to order the Rehabilitator, on an expedited basis,¹ to undo actions undertaken in the past few months by the Rehabilitator and the District, namely, their decision to seek a stay of the proceedings before the Contract Appeals Board ("CAB") while consolidating Chartered's claims against the District of Columbia. The relief sought by DCHSI can only be characterized as a request for a mandatory injunction against an individual acting in his official capacity to fulfill a statutory duty, a request that should therefore be analyzed under standards applicable to a movant seeking the extraordinary remedy of mandamus. *See Fountain v. Kelly*, 630 A.2d 684, 689 (D.C. 1993) (holding that an action requesting a mandatory injunction against an official is analyzed as a request for mandamus). Accordingly, DCHSI should be held to the higher standard for a mandamus petition. *See id.*; *Nat'l Ass'n of Rehab. Facilities, Inc. v. Schweiker*, 550 F. Supp. 357, 365 (D.D.C. 1982) (holding that preliminary injunctive relief seeking to alter the status quo is held to a higher standard).

To prevail on its motion, DCHSI must clearly demonstrate the elements necessary to obtain emergency or preliminary injunctive relief. DCHSI must show "(1) that there is a substantial likelihood [it] will prevail on the merits; (2) that [it] is in danger of suffering

¹ DCHSI provides no reason why its Motion must be resolved on an expedited basis and DCHSI cites no legal authority in support of its request. Although the Court has discretion to expedite the disposition of the action (SCR-Civil 16(i)(1)), exercising its discretion in this manner would allow DCHSI to pursue emergency injunctive relief without making the factual or legal showing required to support such an extraordinary remedy.

irreparable harm during the pendency of the action; (3) that more harm will result to [it] from the denial of the injunction than will result to the [Respondent] from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order.” *In re Estate of Reilly*, 933 A.2d 830, 834 (D.C. 2007) (quoting *Feaster v. Vance*, 832 A.2d 1277, 1287 (D.C. 2003)). DCHSI has not and cannot make the requisite showing.

Rather than demonstrating irreparable harm, DCHSI seems primarily concerned with the timing of Chartered’s ability to collect \$25.8 million on its original claim currently pending before the CAB, a claim that Chartered and the District have jointly requested be stayed until all of Chartered’s pending claims can be consolidated and pursued together in one action. *See* Mem. in Supp. of Mot. to Compel 9. But DCHSI completely disregards how pursuing the original claim would affect Chartered’s ability to efficiently and effectively recover *all* of Chartered’s claims against the District. *See id.* Nor is DCHSI able to explain how it or Chartered would be harmed—much less irreparably so—by the Rehabilitator’s decision to consolidate and pursue all of Chartered’s claims, for over \$60 million, against the District in a single, combined CAB proceeding.

It is in neither parties’ nor the public’s interest for the CAB to proceed with piecemeal consideration of related claims, as DCHSI urges. Chartered’s proposed consolidation of all of its pending claims in one CAB appeal would avoid duplicative discovery and unnecessary expenses. On March 15, 2013, when Chartered communicated to the District the nature of the additional claims, the District agreed that it made practical sense to jointly stay the current appeal, allow the other claims to complete their review before the contracting officer (“CO”), and then consolidate the claims together in one appeal if they are denied or no determination is made within 120 days of their submission. A temporary stay was necessary because fact discovery was scheduled to

close on the original claim and the parties recognized that many of the same witnesses would need to be deposed for both the original and the new claims. Amendment of the original claim as proposed by DCHSI was not an option under the applicable rules, as explained below and in note 5, and DCHSI's proposal ignores the costs of pursuing related claims in a piecemeal fashion (*i.e.*, duplicative discovery and additional litigation costs). Further, "reusing discovery," as DCHSI suggests (Mem. in Supp. of Mot. to Compel 11) would be impractical and fraught with uncertainty and unacceptable risk if necessary evidence was not available later to prove all of Chartered's new claims. In short, Chartered has been working with the District to ensure that the claims are consolidated expeditiously, efficiently, and with the District's consent.

DCHSI nevertheless believes the Rehabilitator should collect now on the original claim (even though that claim is in the midst of factual discovery and the merits hearing under the parties' prior scheduling order would not have occurred until December 2013) in the unrealistic hope that with a sudden capital infusion, "Chartered might emerge from rehabilitation" and compete for the Department of Health Care Finance ("DHCF") Contract "if the bidding process is reopened." See Mem. in Supp. of Mot. to Compel 11 (emphasis added). DCHSI's transparent desire for capital not only ignores that pursuing the claim does not guarantee the collection of \$25.8 million, but also underscores the ulterior and unrealistic nature of DCHSI's goal: to somehow undo the Court-approved Asset Purchase Agreement and recapitalize Chartered out of rehabilitation with money from a CAB judgment (ostensibly to compete in a canceled and reopened RFP process).²

² Moreover, due to the duplicative and overlapping discovery from party and non-party witnesses that would be required, granting DCHSI's Motion would likely impair Chartered's ability to pursue its other claims, harming Chartered more than it would DCHSI. In addition, this Court has noted that "there is a strong public interest in providing uninterrupted Medicaid coverage to Chartered's current 100,000 enrollees from the expiration of the

DCHSI now seeks to force the Rehabilitator to reverse a considered strategy for Chartered's rehabilitation merely because DCHSI disagrees with the pace in which certain of Chartered's claims against the District should be pursued. In making this Motion, DCHSI reveals its complete misunderstanding of D.C. procurement laws and regulations as well as the relevant facts involving Chartered's several claims against the District. Moreover, granting DCHSI's Motion would interfere with the CAB's administration of its docket. The CAB is the exclusive hearing tribunal for "any appeal by a contractor from a final decision by the contracting officer." D.C. Official Code § 2-360.03(a)(2). On April 12, 2013, the CAB granted the parties' consent motion to stay the proceedings. Ordering Chartered unilaterally³ to seek to vacate the stay, as DCHSI requests, would amount to inappropriate and excessive judicial oversight into the CAB's proceedings over which it enjoys primary jurisdiction.

**The Rehabilitator Is Performing His Statutory Duty and
Diligently Pursuing the Claims At Issue**

The relief DCHSI requests in its latest motion hinges on a single proposition: that the Rehabilitator has a statutory duty to pursue Chartered's \$25.8 million claim against the District. There is no dispute, however, that the Rehabilitator is acting under a duty to "take such action as deemed necessary or appropriate to reform and revitalize the insurer." D.C. Official Code § 31-1312(c); Rehabilitation Order 2. DCHSI is thus asking the Court to order the Rehabilitator to perform a duty he is already undertaking: using his best judgment to reform and revitalize Chartered.

current Medicaid contract" Order 5 n.2, Apr. 2, 2013. The public has a similar interest in not disrupting the Rehabilitator's plans insofar as they are related to this goal.

³ Even if Chartered were ordered to seek to vacate the stay, it could not speak or act for the District, which consented to the same relief.

In fact, the Rehabilitator has performed and continues to perform his duty to revitalize and reform Chartered, including vigorously and expeditiously expanding and pursuing all of Chartered's claims against the District. Chartered's original \$25.8 million claim encompassed only pharmacy benefit costs arising from the District's change of Chartered's contract. Following the submission of that claim, Chartered, under the oversight of the Rehabilitator and his advisers, determined that Chartered's initial, pre-Rehabilitation calculation did not properly calculate Chartered's costs in determining the equitable adjustment required due to the District's contract change. The scope and amount of the original claim was recalculated following relevant accounting rules and contract law. Thus, the Rehabilitator and his advisors amended and superseded the original claim, increasing the claim amount from \$25.8 million to over \$51 million. *See* Motion to Compel, Ex. 2. In addition, the Rehabilitator submitted claims regarding a dental program change, and rates associated with the Alliance program's non-Medicaid members. *See* January 4, 2013 Letter from Special Deputy to D.C. Office of Contracting and Procurement (submitting claim in connection with dental services); February 21, 2013 Letter from Special Deputy to D.C. Office of Contracting and Procurement (submitting claim in connection with Alliance Program).⁴ In the new and amended claims, filed in January and February 2013, the Rehabilitator requested an expedited response from the CO. However, even without an expedited response, all of the claims will be "deemed denied" by the District by June 21, 2013. *See* D.C. Official Code § 2-359.08 (b), (c) (claims not decided by the CO within a 120-day period will be deemed denied and can be appealed before the CAB). DCHSI's characterization of the requested temporary stay of CAB proceedings as "indeterminate" is thus

⁴ Copies of the Rehabilitator's submissions to the Office of Contracting and Procurement can be provided to the Court, if the Court so desires.

unfounded. The CAB's April 12, 2013, order in fact limited the stay "for 60 days, or until appellant's pending claims are ruled upon or deemed denied by the contracting officer, whichever is sooner."

Significantly, DCHSI completely disregards that, without the CO's review and denial of the additional claims, the CAB would have no jurisdiction to hear Chartered's appeal. *See* D.C. Mun. Regs. tit. 27, § 200; *see also* D.C. Mun. Regs. tit. 27, § 3803. The CAB's April 12 Order itself observed that "a contracting officer cannot exercise concurrent jurisdiction with the Board over the same claim" and found good cause to grant the stay because "one of appellant's three new claims presented to the contracting officer subsequent to the instant appeal 'amends and supersedes the [instant] claim.'" That is why Chartered could not merely amend the original claim as DCHSI suggests in its Motion.⁵

**DCHSI's Continued Attempts to Interfere with Chartered's
Orderly Rehabilitation Should be Stopped**

This Court previously has recognized that DCHSI should not be interfering with the Rehabilitator's discharge of his duties. As this Court stated in its Order denying DCHSI's Motion For A Stay Pending Appeal, "the Rehabilitation Code obligates the Rehabilitator to act in the best interest of the company, not the best interest of the parent company." April 2, 2013, Order Denying DCHI's Mot. for Stay 2. In rejecting DCHSI's objection to the Rehabilitator's decision not to submit a contract bid on Chartered's behalf, the Court observed that "[t]he

⁵ The parties were also well beyond the date when amendment of the pleadings is typically allowed, even when reserved to the CAB's discretion. Under the CAB's rules, amendment is only permissible when "fair to both parties." *See* D.C. Mun. Regs. tit. 27, § 207.1. The CAB uses D.C. Superior Court's Rules of Civil Procedure to interpret its own rules, and amendment of the pleadings under SCR-Civil 15 is disallowed after 20 days, without leave of the court or consent of the adverse party. *See* D.C. Mun. Regs. tit. 27, § 100.6 ("[T]he Board will be guided by (i) precedent of the District of Columbia courts in construing those Board rules which are analogous to the Rules of Civil Procedure of the D.C. Superior Court . . ."). Given the guidance of the District (the adverse party), pursuing the claims before the CO was the prudent and best approach.

Rehabilitation Code states that the ‘rehabilitator shall have all the powers of the directors, officers, and managers, who[se] authority shall be suspended, except as they are re-delegated by the rehabilitator.’” *Id.* at 3 (quoting D.C. Official Code § 31-1312(c)). The Rehabilitator also has “[a]uthority to take such action as deemed necessary or appropriate to reform and revitalize Chartered.” October 19, 2012, Emergency Consent Order of Rehabilitation 2; *see also* D.C. Official Code § 31-1312(c). It is well established that in exercising his statutory powers, a “rehabilitator is granted authority to make judgments and take actions he believes to be in the public interest. The trial court’s primary role is a supervisory one and the standard of the court’s review of the rehabilitator’s actions is one of abuse of discretion.” *Kentucky Central Life Insurance Company v. Stephens*, 897 S.W.2d 583, 587-88 (Ky. 1995). “As the program of rehabilitation takes form and the steps unfold, the trial court in its supervisory and reviewing role may not substitute its judgment for that of the Commissioner, but may and should only intervene or restrain when it is made to appear that the Commissioner is manifestly abusing the authority and discretion vested in him and/or is embarking upon a capricious, untenable or unlawful course.” *Kueckelhan v. Federal Old Line Ins. Co. (Mutual)*, 444 P.2d 667, 674 (Wash. 1968).

DCHSI presents no facts to support, nor does it suggest, that the Rehabilitator is “manifestly abusing his authority” or “embarking upon a capricious, untenable or unlawful course” in this rehabilitation proceeding. The Rehabilitator has engaged competent counsel to pursue all of Chartered’s claims against the Department of Health Care Finance (“DHCF”). With the assistance of counsel and his other advisers, the Rehabilitator has undertaken a deliberate rehabilitation strategy, which includes the aggressive pursuit of all claims on Chartered’s behalf, as he deems necessary and appropriate. Moreover, as discussed in response to DCHSI’s now-denied Motion to Stay, the Court has already addressed any concerns about

how the claims against DHCF will be handled: the Rehabilitation Order provides that Chartered's claims against DHCF cannot be settled without this Court's approval. October 19, 2012, Emergency Consent Order of Rehabilitation 2.

A rehabilitator has broad discretion to act according to his or her best judgment, and neither he, the Court, nor the rehabilitation process can function effectively if each such strategy, decision or judgment is subject to being second-guessed, in hindsight, by a parent company that demands an opportunity to argue that it would have done something differently. DCHSI's Motion to Compel is another improper attempt by DCHSI to meddle in matters that are committed to the Rehabilitator's authority, discretion and good judgment when exercising his legal duties to act in the best interests of Chartered.

Conclusion

For all of the foregoing reasons, the Court should deny DCHSI's Motion to Compel.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the
District of Columbia

ELLEN A. EFROS
Deputy Attorney General
Public Interest Division

/s/ *Stephane J. Latour*
STEPHANE J. LATOUR
Chief, Civil Enforcement Section

/s/ *E. Louise R. Phillips*
E. LOUISE R. PHILLIPS
Assistant Attorney General
Bar Number 422074
441 Fourth Street, N.W., 630 South
Washington, D.C. 20001
202-727-0874, fax 202-730-0658
louise.phillips@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2013, a copy of the foregoing was filed and served by email upon:

William P. White, Commissioner
c/o Thomas M. Glassic, General Counsel,
DISB, Office of the General Counsel
810 First St., NE, Suite 701
Washington, D. C. 20002
Thomas.Glassic@dc.gov

Charles T. Richardson, Esquire
Faegre Baker Daniels LLP
1050 K Street NW, Suite 400
Washington, DC 20001
crichardson@faegredb.com

Daniel Watkins, Esquire
Special Deputy Rehabilitator
1050 K Street NW, Suite 400
Washington, DC 20001
danwatkins@sunflower.com

Courtesy Copies to:
David Killalea, Esquire
Manatt, Phelps & Phillips, LLP
700 12th Street, NW, Suite 1100
Washington, DC 20005-4075
dkillalea@manatt.com

Joseph D. Edmondson, Jr.
3000 K Street, NW, Suite 600
Washington, D.C. 20007
jedmondson@foley.com

Steven I. Glover, Esquire
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, D. C. 20036
siglover@gibsondunn.com

/s/ E. Louise R. Phillips
E. Louise R. Phillips
Assistant Attorney General